Office-Supreme Court, U.S.
FILED
MAR 14 1964
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 812

WILLIAM HOWARD (PAT) O'BRYAN,
Appellant,

VERSUS

STATE OF OKLAHOMA, EX REL. OKLAHOMA BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

WILLIAM D. FORE,
1310 South Agnew,
Oklahoma City, Oklahoma,
Attorney and Counsel for Appellant.

Of Counsel:

W. HOWARD O'BRYAN, JR.,

March, 1964.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

SUBJECT INDEX

	PAGE
Statement	1
The Federal Questions Presented Are Substantial	1
1. The Bar Association's action in the selection among alternative procedures was arbitrary and capricious	2
2. The combining in one body or members thereof of the role of accuser, prosecutor and judge was repugnant to the due process clause	3
3. The admission of hearsay evidence denying the right of confrontation, especially under certain special circumstances herein present, was repugnant to the due process clause	5
4. The danger inherent in the possible production of a warped record by a predisposed trial examiner is repugnant to the due process clause of the Constitution	6
5. 6, 7. Disbarment based on an abandoned charge of "having filed a false and fraudulent claim" violated the due process clause	8
The Argument That the Judgment Appealed From Rests on an Adequate Non-Federal Basis Is Unsound	9
Conclusion	10

AUTHORITIES

CASES:

Brinkley v. Hassig, 10 Cir., 1936, 83 F.2d 351	3, 4
McVicar v. State Board of Law Examiners, D.C. W.D. Wash., 1925, 6 F.2d 33	3, 4, 5

INDEX CONTINUED

PAGE

Murchinson, In re, 349 U.S. 133, 75 S.Ct. 623 ..... 3, 4, 5

Schlesinger's Appeal, In re, 404 Pa. 584, 172 A.2d 835 ..... 5, 9, 10

Theard v. U. S., 354 U.S. 278, 77 S.Ct. 1274 ..... 5, 6

Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 455 (1950) 4

MISCELLANEOUS:

Oklahoma Supreme Court Rules, Art. VII, pt. 1, Sec. 20(b) 2

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 812

WILLIAM HOWARD (PAT) O'BRYAN,
Appellant,

VERSUS

STATE OF OKLAHOMA, EX REL. OKLAHOMA BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Appellant is advised that the function of a Brief in Opposition to a Motion to Dismiss is to explain to this Court his position on the arguments of Appellee. This brief is therefore so arranged.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

Contrary to the suggestion made by Appellee, Appellant has not argued that the Rules of the Oklahoma Supreme Court in relation to disciplinary matters are in and

of themselves repugnant to the due process clause. Appellant's position is rather that as applied to him they are repugnant to due process.

The Rules are very flexible and it is entirely possible to follow them and have a perfectly valid disciplinary proceeding. But, such was not the case in the case at bar. As applied to Appellant, he was denied proceedings that were essentially fair.

Appellee's Motion to Dismiss (p. 5) reviews the procedure. At this point Appellant will object only to Appellee's exaggeration of the role of the Supreme Court of Oklahoma in the process of review. The review of the Court is of the record on exceptions, briefs and argument, Oklahoma Supreme Court Rules Art. VII, pt. 1, § 20(b) and (c) (Jurisdictional Statement, Appendix, p. lxv). Because this is the extent of the review, it is of utmost importance that the making of the record which is to be reviewed be essentially fair.

Appellee then turns to the examination of Appellant's contentions in his Jurisdictional Statement.

1.

The Bar Association's action in the selection among alternative procedures was arbitrary and capricious.

Appellant had contended that among the alternatives available to Appellee in the preliminaries, that Appellee had consistently chosen that alternative which gave Appellant the least opportunity to defend himself—even though the charge was one of utmost gravity. In answering Appellant's argument, Appellee tacitly admits the truth of this assertion (Motion to Dismiss, p. 6, first paragraph), and

says "due process was satisfied by the hearing before the Trial Examiner and the complete review [of the record] in the Oklahoma Supreme Court.

The matter of the fairness of the hearing before the Trial Examiner, becomes then the very keystone to due process.

2.

The combining in one body or members thereof of the role of accuser, prosecutor and judge was repugnant to the due process clause.

Appellant had argued in his Jurisdictional Statement, pages 24-29, that this hearing was fatally short of being a fair hearing because it was before a member of the Executive Council or Central Committee which body had preferred the charges and appointed the Trial Examiner from their own numbers. These same officials through Appellee's counsel at the hearing recommended disbarment to the Trial Examiner (Jurisdictional Statement, p. 25, referring to Tr. Vol. 2, p. 191).

Here on the record is a showing of actual bias of the group *from* which and *by* which the Trial Examiner was selected.

> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchinson*, 349 U.S. 133, 136, 75 S.Ct. 623, 625.

Appellee implies that *Brinkley* v. *Hassig*, 10 Cir., 1936, 83 F.2d 351 and *McVicar* v. *State Board of Law Examiners*, D.C. W.D. Wash., 1925, 6 F.2d 33, are persuasive of the

proposition that the combination of the roles of prosecutor and judge is not repugnant to due process (Motion to Dismiss, p. 6).

In re Murchinson, 349 U.S. 133, 136, 75 S.Ct. 623 (Jurisdictional Statement, p. 27), was decided in 1955 and *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 70 S.Ct. 455, in 1950 (Jurisdictional Statement, p. 28).

Brinkley and *McVicar* were both decided many years before these two United States Supreme Court cases and hence the impact of the Supreme Court cases was not felt therein.

Of still further significance is this statement in the *Brinkley* case:

> "The spectacle of an administrative tribunal acting as both prosecutor and judge has been the subject of much comment, and efforts to do away with such practice have been studied for years." 83 F.2d at 356.

The Tenth Circuit decided the *Brinkley* case on the basis of necessity. It pointed out that the board in question was the only board empowered to hear the matter and pointed to the rule that disqualification would not be permitted to destroy the only tribunal with power in the premises.

This is obviously not like the case at bar. Herein as it was previously asserted there was no limit, other than the implied limit of membership in the Bar, as to whom the Central Committee or Executive Council might have appointed to act as Trial Examiner. And indeed, as pointed out, the selection of one of their own number was a departure from a past practice of considerable standing (Jurisdictional Statement, pp. 24-25).

In *McVicar*, the Court pointed out that the role of the Bar examiners, was that of "masters of the court to take proof and submit findings thereon," 6 F.2d at 35, and that "the board has no power to pass upon the merits of the charges made." *Id* at 36.

Under these circumstances, it would surely seem that the recent Pennsylvania case of *In re Schlesinger's Appeal*, 404 Pa. 584, 172 A.2d 835 (Jurisdictional Statement, pp. 26-27) whose facts are like those in the case at bar and which relies squarely on *Murchinson* is far more persuasive than *Brinkley* and *McVicar*.

3.

The admission of hearsay evidence denying the right of confrontation especially under certain special circumstances herein present, was repugnant to the due process clause.

Appellee's argument here is that Judge Chandler's summary order of disbarment (issued in patent violation of the principles laid down in *Theard* v. *U. S.*, 354 U.S. 278, 77 S.Ct. 1274) was evidence of Appellant's fraud and hence its introduction was not a denial of due process.

As Appellant has previously suggested (Jurisdictional Statement, p. 32), there is a split of authority as to whether the transcript of testimony taken in another suit can be admitted in a disbarment proceeding without denying due process. And even in these cases there is the requirement of the laying of the proper predicate. Here, no predicate was laid and the hearsay involved not only included testimony of witnesses, but a "void" order of disbarment by the Federal Judge.

In the *Theard* case, *supra*, this Court sought to prevent what it considered undesirable state disbarment proceedings from infecting disbarment proceedings in the Federal Courts. This Court ought to be just as concerned about the infection spreading in the opposite direction.

In order that the Court may not be misled, Appellant would call to its attention that there was no evidence that the purported letter employment contract was a forgery in the popularly accepted sense of the word. The authenticity of the signatures of the parties to the contract were never questioned.

4.

The danger inherent in the possible production of a warped record by a predisposed trial examiner is repugnant to the due process clause of the Constitution.

Appellee in its answer to this proposition of Appellant simply ignores the main thrust of Appellant's argument. Appellee considers only the question of the refusal of the State Supreme Court to have the minutes of the Bas Association certified as part of the record. Appellant wanted these minutes certified only to show further the predisposition of the Executive Council and of its member and appointee, the Trial Examiner in particular.

The warping of the record to which Appellant had reference in particular is itemized throughout the Jurisdictional Statement: *e.g.*, the Trial Examiner's erroneous refusal to consider certain testimony, to the effect that the letter contract was in existence well in advance of any dispute about the claim; and even to accept a brief on its

admissibility (Jurisdictional Statement, pp. 14 and 37); his admission of hearsay over Appellant's objection (*id.* p. 37); the Trial Examiner's refusal to admit evidence as to the Appellant's intent (*id.* p. 37); and the Trial Examiner's basing of his recommendation of disbarment, at least in part, upon Judge Chandler's ruling in the bankruptcy matter and his summary disbarment of Appellant (*id.* p. 31).

These are concrete examples of the way in which the record was warped.

Appellant's argument is simply this. The keystone of due process in a case of this nature is a fair hearing in the primary sense of the word, as here applied, the hearing before the Trial Examiner. This is so because it is the Trial Examiner who controls the making of the record. This record, where all further review is going to be based upon it, must be true and fair in any case. But more particularly this is true where the Trial Examiner is authorized not only to take evidence but to make findings, conclusions and recommendations.

It is contemplated that the findings and recommendations are to be given some weight by those who review it—otherwise, the Trial Examiner would not be authorized to make findings and recommendations. Regardless of the exact weight and the scope of review, a warped record and recommendations based thereon would put the momentum of the case running well against the accused. It is therefore of utmost necessity that the Trial Examiner be free of all predisposition.

5, 6, 7

Disbarment based on an abandoned charge of "having filed a false and fraudulent claim" violated the due process clause.

The fast and fancy foot-work of Appellee in this regard has kept Appellant off balance from the initiation of this matter.

And this footwork continues to this time. Appellee in its Motion to Dismiss admits, though not as expressly as did Appellee's counsel and Appellee's Trial Examiner (Jurisdictional Statement, pp. 15-16) that aside from the use of the allegedly ante-dated letter contract, Appellant's claim was not false and fraudulent and was in fact a valid claim in all respects.

Yet the charge, of which Appellant stands "convicted" in the eyes of the public, is that of having filed, without any foundation, a claim for a million dollar fee.

Appellee, except when pinned down, asserts not that Appellant filed a false instrument in support of an otherwise valid claim, but insists on charging him with filing a false and fraudulent claim. The Report of the Trial Examiner concludes:

> "From the foregoing facts the Trial Examiner concludes that the Respondent William Howard (Pat) O'Bryan filed a false and fraudulent claim for attorney fees * * *" (Jurisdictional Statement, Appendix, p. liii).

This is again repeated in the Report of the Executive Council to the Supreme Court of Oklahoma (Jurisdictional Statement, Appendix, p. xlvii).

The ambivalence of Appellee, in regard to what the charge against Appellant is and was, is significant in two respects. First, Appellee's insistance, on using the language "false and fraudulent claim," involves the use of the Big Lie technique, shows an utter disregard for basic decency and fair play, and is further evidence of the bias of the group which served as accuser, prosecutor, judge, and initial review board.

Second, the admission that Appellant's misconduct, if any there was, is solely that he bolstered his valid claim by the use of the disputed letter contract focuses attention on this matter. Evidence (and that completely discredited. Jurisdictional Statement, pp. 28-29) tending to prove that the stationery was not in existence until September 1955, is permitted to prove that a letter written thereon was not written until sometime in 1958.

THE ARGUMENT THAT THE JUDGMENT APPEALED FROM RESTS ON AN ADEQUATE NON-FEDERAL BASIS IS UNSOUND

Appellee suggests that Appellant, in relying on *In re Schlesinger's Appeal*, discloses that the judgment in the case at bar rests on an adequate non-federal basis (Motion to Dismiss, p. 8). Inasmuch as Appellant has asserted only that the Rules of the Supreme Court of Oklahoma, as applied to him, are repugnant to Federal due process, Appellant is confused by Appellee's argument.

The assertion that a judgment appealed from "rests on an adequate non-federal basis" is not responsive to the challenge that the judgment is repugnant to the due process clause of the Federal Constitution.

It is true that the judgment in the *Schlesinger* case was decided on a non-federal basis in part. The process so like the process herein involved was held to be offensive to the State Constitution of Pennsylvania as well as to the Federal Constitution in that the process combined in the members of one body the roles of accuser, prosecutor and judge. But that *Schlesinger* rested on an adequate non-federal basis does not destroy its persuasive value herein. There is certainly some relationship between the Pennsylvania and Federal due process concepts.

CONCLUSION

There is in the folklore of the law schools an apocryphal statement of Mr. Justice Holmes to this effect:

"If it makes you want to puke it lacks due process."

(From the salt content of the statement, Judge Learned Hand would be a more likely suspect.)

A nauseant will be found by many in the fact that all the behavior of Appellee would permit to be claimed for Appellee in the Motion to Dismiss was that it granted minimal due process.

To find such calloused indifference in the governing body of an association of lawyers (who are the proclaimed guardians and champions of the values of Magna Carta) is indeed disillusioning.

But that which is of significance to this Court is that Appellee, in its studied effort to deny Appellant all but the minimal due process, slipped in several important regards and denied him even that.

For that reason it is respectfully urged that this Court assume jurisdiction to hear this appeal on its merits.

Respectfully submitted,

WILLIAM D. FORE,
1310 South Agnew,
Oklahoma City, Oklahoma,
Attorney and Counsel for Appellant.

Of Counsel:

W. HOWARD O'BRYAN, JR.,

March, 1964.